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IN THE

Supreme Court of the United States

SUPER SULKY, INC.,
Petitioner,

v.

UNITED STATES TROTTING ASSOCIATION
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

The United States Trotting Association is a non-profit corporation, which has no parent corporation or publicly held company owning 10% or more of its stock.

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STATEMENT OF FACTS

1. The USTA

Since 1932 the United States Trotting Association has promulgated harness racing rules, adopted standards for the registration of horses, collected and published statistics on harness racing used by those wagering on races, and, in general, promoted harness racing in the United States and portions of Canada. The approximately 30,000 USTA members include government officials from states which have harness tracks. The membership does not include any sulky manufacturing companies. The USTA is governed by a sixty member Board elected by the membership.

The USTA neither manufactures racing sulkies, nor receives royalties or other financial consideration from those who do. No financial or economic incentive of any type was proven at trial to underlie the USTA rulemaking at issue in this case.

2. State Racing Commissions

Each State in which organized harness racing occurs has a racing commission to regulate all racing at which pari-mutuel wagering is conducted. Such races constitute approximately 93-95% of all racing and dominate the economics of the harness racing industry. Races at which USTA rules directly apply are, therefore, limited to non-wagering events, such as small county fairs. These amateur events have little economic impact upon the racing industry.

The USTA sulky design rule at issue in this case, or some variation of it, was adopted by individual states over a period of approximately two years. This reflects many factors including recognition of USTA expertise and confidence in the integrity of USTA-led investigations into matters of importance to the sport of harness racing. The USTA has no ability to "override" state-promulgated rules for harness racing. Thus, the lower courts flatly rejected Petitioner's contention that USTA rulemaking directly harmed its business:

> Here it was the actions of the various state racing commissions that were directly responsible for Super Sulky's harm, because they are the ones that make the final choices as to what type of sulkies are to be used at each track. Although the USTA's actions are highly influential, its decisions in the present case were ultimately only recommendations to the state racing commissions.
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> 174 F.3d, at 743; App. A-22-23

3. The Sulky Industry

A harness racing driver sits behind the horse on a two-wheeled cart called a "sulky." It is hitched to the race horse by two metal or wooden "shafts." For many years the industry relied upon what were called "traditional" or "modified--traditional" style sulkies in which the shafts were fairly straight between the sulky and the horse. Even during these years the manufacturing of sulkies was a competitive business,

due to the ease of marketplace entry. No manufacturer truly dominated the industry, although most observers believed the Jerald Sulky Company of Waterloo, Iowa ("Jerald") was the "industry leader" through much of the 1980's and early 1990's. Jerald, a small, family-owned business of some 21 employees, has been in business since 1898. As Petitioner essentially concedes, new entrants into this marketplace, like Super Sulky itself, could readily compete head-to-head with Jerald. (Petition, pp. 6, 8).

Some manufacturers began experimenting in the early 1990's with a new "bent-shaft" sulky design. Nassau Sulky, a manufacturer of modified-traditional style sulkies, claimed to have first marketed a bent-shaft design. Thereafter Petitioner introduced its bent-shaft design named the "Cheetah Super Sulky" in August, 1992. Jerald entered the bent-shaft market in 1993, with its own variation on the bent-shaft design. "Cheetah" or "Cheetah-style" nomenclature became a generic reference for a subset of bent-shaft design whether or not manufactured by Petitioner.

Unlike its competitors, Petitioner manufactured only one style of sulky. When a ban on bent-shaft sulkies was first recommended in August, 1993, Super Sulky immediately ceased making anything, choosing not to compete in the modified-traditional sulky market.

4. Sulky Designs and Their Impact on Racing

The somewhat radical hourglass design of Super Sulky's "Cheetah" style bike was popular from its introduction among some drivers. The shafts were quite a bit higher on a Cheetah style bike, and the stirrups were only 7" apart (unlike the modified-traditional design in which they are 30" apart). However, the bent-shaft design almost immediately became controversial for at least two reasons: (1) concern about visibility and balance problems for drivers, and the resulting potential for race accidents or similar safety hazards; and (2) concern that the new style bikes enjoyed a slight competitive advantage over the traditional style, such that "sulky design" won races rather than the horse and driver.[1] Given the foregoing, a related concern arose over confusion or lack of adequate information among fans, and the potential effect on betting or decline in customers at tracks. Some tracks experimented with notations in their racing program to inform the public of new sulky designs, while other solutions were also considered. For example, the director of Chicago area tracks considered direct track ownership of all sulkies as a way to standardize designs and eliminate bettor confusion.

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[1] Concern about standardizing design so it did not affect race results, contrary to Petitioners statement p. 12, was evident early in the process, as the uncontradicted record shows. It did not first surface "shortly before trial when the USTA" started consulting Professor Meeks, and to suggest that conclusion is a serious misrepresentation of the factual record.

By early 1993, enough drivers were expressing concern among themselves and to their respective horsemen's associations that meetings were held within the industry outside of the USTA. Petitioner's two principals attended several large *ad hoc* meetings at which concerns were discussed by drivers and others within the industry. While some drivers liked bent-shaft and cheetah style sulkies (particularly if they perceived a greater chance of winning a close race against modified-traditional bikes,) this view was not widely shared. On the other hand, even drivers who did not like bent-shaft style bikes sometimes used them out of concern they might not be as competitive driving a modified-conventional sulky. All-time leading money-winner John Campbell, a witness at trial, was among such drivers and Petitioner's President "knew [Campbell's] opinion carried a lot of weight."

As controversy over bent-shaft style bikes grew throughout the harness racing industry, bans on bent-shaft style bikes were considered and even implemented at some racetracks. The USTA, as the only national organization whose mission was overall promotion and standard-making for harness racing, convened a panel discussion on sulky designs at its annual meeting in the Spring of 1993. Prompted by that panel discussion and the general controversy in the industry, the USTA's Board created an industry-wide sulky committee (the "Committee") at that same annual meeting. The express purpose of the Committee was straightforward, namely to render:

> assistance to State Racing commissions and State legislators in the establishment of legal policies and guidelines prescribing procedures for standardization, in terms of configuration, construction and reliability.

The USTA had created similar study committees in prior years for other purposes. Moreover, the USTA reviews its Rules and proposes changes thereto at least annually. For instance, the USTA had previously promulgated Rules respecting helmet design and a shaft design thought to be unsafe.

5. The Industry Wide Sulky Committee

Pursuant to Board authorization, the USTA's Executive Vice-President invited individuals from a variety of backgrounds to serve on the Committee. The eighteen members reflected a cross-section of the industry, and it was stipulated at trial this Committee included no sulky manufacturers. Horse owners, breeders, drivers, trainers, plus representatives of tracks, horsemen's' associations, and owners associations were invited to serve as members. Each state racing commission was also invited to designate a representative to the Committee, and ultimately ten of eighteen members of the Committee were full-time employees of racing commissions.

There was no evidence that Committee members were in any way corrupted to serve the interests of Jerald or any other sulky manufacturer. Even Petitioner's primary trial witness testified he had no basis for believing that any sulky manufacturer dictated the membership of the Committee, or that any Committee member accepted bribes or financial favors from any sulky manufacturer. While some Committee members expressed concern about bent-shaft bikes prior to the first meeting of the Committee, they were neither in the majority nor did such individuals "represent" any manufacturer. As the Court of Appeals recognized, moreover, the Committee "was not convened as a jury, but instead as a committee of knowledgeable people committed to the best interest of the sport." 174 F.3d, at 739; App. A-13.

The Committee met five times between May and August, 1993. Each sulky manufacturer was invited to make a presentation. Craig Stein, President of Petitioner Super Sulky, expressed to the Committee that he believed many drivers liked his bike, and perhaps it should be the standard. Bill Card, President of Jerald and a longtime participant in the industry, told the Committee during its deliberations he thought the modified conventional style sulky should be the industry standard. Mr. Card expressed this view even though Jerald was earning unprecedented profits selling its version of the bent-shaft bike. App. B-20.

The Committee's work was well publicized. Several of its meetings were recorded by a court reporter and those

transcripts were part of the Record below. However, when no clear consensus was readily reached on whether to standardize sulky design, Petitioner's President Stein suggested the Committee survey actual USTA member-drivers. Acting on Stein's recommendation, such a survey was conducted. No evidence at trial supported the statement (Petition, p.9) that the Committee "had determined to make the traditional sulky style *the* standard" before the USTA surveyed the drivers.

6. The Survey of Drivers

The driver survey was prepared primarily by Kent Hastings, a longtime USTA employee. Although lacking formal training in statistics, Mr. Hastings had a lifetime of relevant experience in harness racing, including service as a Judge for several state racing commissions. Uncontradicted expert testimony adduced at trial from a nationally known university professor specializing in polling, who reviewed the Committee's driver survey, proved that the survey had little margin of error and that the results were trustworthy. 3,571 surveys were mailed, and the Committee received a 36.3% response rate. Petitioner's assertion that this evidence was nothing more than "anonymous hearsay" (Pet. p.10) neither overrides the trial court's decision to admit it, nor undermines its weight.

Petitioner suggests "no concrete evidence" documented any safety issue (Pet. at 9). Yet, survey results proved that a majority of drivers who had actually used a cheetah-style or other bent-shaft sulky considered these

designs unsafe. There could hardly have been better evidence than the views of drivers who actually race every day. Sixty percent (60%) of drivers who had used such bikes thought they provided limited visibility; 52% said the bikes created driver stability problems; and 53% considered them unsafe. On the other hand, no more than two percent (2%) of drivers believed there were visibility, stability or safety problems with conventional sulkies. Seventy-eight percent (78%) of those polled believed that sulky design should be standardized using conventional sulkies as the standard.

Having received such poll results, the Committee recommended in August, 1993, that standardized sulky dimensions be adopted. The recommendations used the design and dimensions of the modified traditional sulky then marketed by several manufacturers. Without awaiting either final USTA action on the recommendation (which was not scheduled to occur until the annual meeting the following Spring) or action by any state racing commission, Petitioner filed this antitrust suit in August, 1993.

In March, 1994, the full sixty-member USTA Board considered the Committee's recommendations and, after recorded debate and some additional revisions, adopted them. The only direct impact upon commerce which this had was to limit the use of bent-shaft bikes at USTA-sanctioned events where no wagering occurred (about 5-7% of all races). State racing commissions still had to formally adopt the USTA standards before bent-shaft bikes could be eliminated wherever pari-mutuel betting was involved. Thus, one key

factual predicate – that the effect of the Committee's recommendation "was to drive from the market a strong competitor" (Pet. at 13) - is vehemently disputed.

Apparently all sulky manufacturers, including Jerald, initially lost business following announcement of the Committee's recommendations concerning standardization. As the Court of Appeals acknowledged, Jerald wrote at least one angry letter pleading for quicker action to settle the issue, and participated in discussions about formation of a manufacturers association, conduct which both lower courts recognized to be inconsistent with any notion Jerald was a co-conspirator. 174 F.3d, at 739-40, App. A-14; B-19-20. Nevertheless, Petitioner was the sole manufacturer that elected to go out of business, rather than market a product in compliance with the proposed uniform standards. Appellant closed, Mr. Stein admitted at trial, because the onset of a fatal illness for his main business partner made it "just an impossibility to make another [style] bike."

7. The Sulky Market after Standardization

Prior to the rulemaking concerning bent-shaft designs at issue in this case, the sulky manufacturing industry was made up of only nine firms in the United States. By the time of trial in 1997 eleven domestic manufacturers were in business. One knowledgeable observer testified at trial that "the competitiveness today is just as much as it's ever been, if not more. It's strong right now." Thus, the assertion by Petitioner (at 13) that the sulky market was "highly

concentrated and demand inelastic" is not supported in the Record, and no economist testified to any such conclusions.

ARGUMENT

A. Lack of Evidence of a "Conspiracy" between the USTA and Any Manufacturer

Petitioner seeks review premised largely upon the notion that this fact-specific case has inherent in it debatable questions about the proper scope of "conspiracy" analysis under §1 of the Sherman Act. Yet, that analysis has been clearly set forth since this Court's landmark rulings in the mid-1980's. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), *Monsanto Corp. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984). Those decisions are being applied without difficulty across the country. This is evidenced in their widespread citation, by the clarity of the Sixth Circuit opinion in this very case, and by an earlier Sixth Circuit decision, also applying *Matsushita* and *Monsanto*, viewed as "controlling" in this case. 174 F.3d, at 737-738, applying *Riverview Investments, Inc. v. Ottawa Community Improvement Corp.*, 899 F.2d 474 (6th Cir.) *cert. denied* 498 U.S. 855 (1990). This Petition presents nothing more than the application of well-settled precedent to a new set of facts.

All four Judges who reviewed the record of the two week trial concluded that a just result was reached in this case, and that a conspiracy was not proven, in part, because the evidence did not exclude the possibility that the USTA and its alleged co-conspirator Jerald acted independently. Beyond that, the trial judge acknowledged that "the defendant has provided affirmative evidence (although it has no burden to do so) to support a finding of independent conduct on the part of both the USTA and Jerald." (App. B-18). Thus, this case turned upon whether there was any meaningful factual support for a jury finding of conspiracy, a prerequisite to every §1 Sherman Act lawsuit, and not upon any new interpretation of federal law. The lower courts' appraisal of the factual record regarding this issue should not be disturbed by this Court.

The conclusion that no conspiracy existed is readily understood, in part, because of the absence of any meaningful evidence of "economic motive" suggesting the process followed by the USTA was an illegal sham. In setting aside the verdict (App. B-23, B-26) the experienced trial judge and carefully analyzed Petitioner's arguments and determined there was no economic motive, or indeed any other meaningful evidence of a "conspiracy." The absence of any economic motive materially undercut Petitioner's theory at trial that there was a conspiracy in which Jerald sought seeking to capture or corrupt the USTA rulemaking process. The Sixth Circuit agreed. No economic motive caused the USTA to prefer a traditional design over a newer

one. The sure conclusion from the Record was that "Super Sulky's conspiracy claim is based upon circumstantial evidence, coincidence, and speculation." 174 F.3d, at 738.[2] These findings applied the Sherman Act in a straightforward manner which should remain undisturbed by this Court.

Throughout this case Petitioner has dodged the impact of this Court's precedents derived from economic reality, in attempting to argue that economic motive is irrelevant when analyzing ambiguous evidence of "conspiracy." (Pet. at 20) Most tellingly, Petitioner could only say – after two weeks of trial – "I think its improper to interject motive ... [s]tupidity and craziness and inexplicable reasons are all perfectly fine and account for most misbehavior in the world." (Transcript of jury charge conference, App. to Petition at D-3; see also trial court opinion, App. at B-14, fn. 6). The law is not so cavalier.

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[2] Indeed, whether the Record contained sufficient evidence to send the case to a jury at all was troublesome. For instance, in a Report and Recommendation issued on Respondent's Civil Rule 56 Motion, a Magistrate Judge concluded Petitioner "failed to produce evidence excluding the possibility that the USTA acted independently." (Appendix to Petition, pg. C-18). The District Judge disagreed because he felt "the Magistrate placed too heavy a burden on Cheetah at the summary judgment stage" (Appendix C-14), relying in part on the allegation, unproven at trial, that the USTA process was corrupted by one or more sulky manufacturers.

Cases upon which Petitioner relies, particularly *United States v. General Motors Corp.*, 384 U.S. 127 (1966), do not suggest a lesser standard of evidence ought to be required. *GM* addressed a situation in which there was direct evidence of a horizontal conspiracy between competing retail dealers and the issue was whether GM was a party to such conspiracy. While the evidence presented in *GM* warranted that holding, nothing comparable showing joint and collaborative conduct was presented here. Similarly, the USTA rulemaking process was not captured or corrupted as it had been in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988). Absent corruption of the process such as was evident in *Allied Tube*, *supra*, the general premise prevails, namely that private organizations which promulgate standards using "procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition ... can have significant procompetitive advantages." 486 U.S., at 501.

Petitioner attempts to distinguish *Matsushita* and *Monsanto*. But in those cases the question presented was whether evidence of parallel conduct was itself a sufficient basis for a jury finding of any "conspiracy." Without parallel behavior there would have been no evidence at all of conspiracy in *Matsushita*. In *Monsanto* there was evidence other than mere parallel behavior to support a finding of conspiracy. Neither decision stands for a notion that without

parallel behavior one can infer a "conspiracy" from nothing.

B. Industry Standard setting and Rulemaking

The approach advocated by Petitioner in its Questions Two and Three would have a pernicious impact on many types of rule-making and standard-setting organizations. In a wide variety of such organizations beneficially impact American life.

Rulemaking is essential in sports. Disruption of our society's attachment to sporting events would surely follow if the test for finding a "conspiracy" under §1 of the Sherman Act were seriously relaxed, as Petitioner asks. Basketball, tennis, auto racing, golf, hockey and bridge have all been the target of antitrust attacks based on rule-making to maintain the essential elements of such sports.[3] Moreover, eligibility

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[3] *E.g., M & H Tire Co., Inc. v. Hoosier Racing Tires Corp.*, 733 F.2d 973, 986 (1st. Cir. 1984) (tire standardization in auto racing; a case similar in many ways to this one); *U.S. Trotting Ass'n v. Chicago Downs Ass'n, Inc.*, 665 F.2d 781 (7th Cir. 1981) (use of horse racing data); *Gunter Harz Sports, Inc. v. U.S.T.A., Inc.*, 511 F.Supp. 1103 (D. Neb. 1981) (specifications for tennis rackets); *Neeld v. National Hockey League*, 594 F.2d 1297 (9th Cir. 1979) (safety rule that forbid player blind in one eye from participation in professional hockey); *Hatley v. American Quarter Horse Ass'n*, 552 F.2d 646, 653 (5th Cir. 1977) (standards for horses); *Bridge Corp. of America v. American Contract Bridge League, Inc.*, 428 F.2d 1365, 1370 (9th Cir. 1970) (requirements to be recognized as an official ACBL bridge tournament); *STP Corp. v. United States Auto Club, Inc.*, 286 F. Supp. 146 (S.D. Ind. 1968) (standardization

rules in college sports, and other collateral matters have likewise been attacked under the Sherman Act. *R.M. Smith v. National Collegiate Athletic Association*, 139 F.3d 180 (3rd Cir.) *cert. denied* in No. 98-107, 119 S.Ct. 170 (1998).

Sports is not the only field in which non-governmental rule-making or standard-setting operates. The recent decision in *DM Research v. College of American Pathologists*, 170 F.3d 53 (1st Cir. 1999) offers an example of standard setting in another area, namely reagent water used in laboratories, which resulted in a challenge under §1 of the Sherman Act. *DM Research* reflects the quickness – even under existing law - with which those unhappy with new rules or standards attempt antitrust lawsuits. The decision also demonstrates that the legal rules currently used to analyze rule-making under §1, promulgated by this Court in the mid-1980's, remain well understood and yield predictable practical justice. Organizations like the USTA across America benefit from the certainty in existing law.

The well-reasoned opinion in *DM Research* recognized that, while standard-setting or rule-making processes can be corrupted, as was the situation presented in cases like *Allied Tube & Conduit Corp, supra*, and *American*

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of lubricants for auto races); *Deesen v. Professional Golfers' Ass'n*, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966) (qualification tests to play in professional golf tournaments); *see also*, *Chicago Prof. Sports Ltd. v. Nat. Basketball Ass'n.*, 95 F.3d 593 (7th Cir. 1996) (broadcast rules).

Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982), those examples do not justify expensive litigation every time someone disagrees with a new rule or standard set by some private organization. Petitioner proposes nothing but that outcome with its Questions Presented here, since there was no evidence of the capture or corruption of the USTA rulemaking process. Answering either Questions Two or Three in the manner sought by Petitioner would implicitly condemn those who participate, often as volunteers, in sports and industry-based standard setting and rulemaking to frequent, expensive litigation in the wake of regulatory decisions. Henceforth, mere collaborations, chance encounters at meetings, or personal friendships among "knowledgeable people committed to the best interests of the sport," as the Court of Appeals termed the members of the Committee (174 F.3d, at 739) would, if Petitioner's view were applied, be enough to provide *prima facia* evidence of the key "conspiracy" element required by §1. In other words, it would seem that all three Questions Presented could result in equating even the most innocent actions taken "jointly and collaboratively" with a "conspiracy." Upon this precise issue *Monsanto*, *Matsushita*, and *Riverview* all demanded much more.

Petitioner's view of the Questions Presented also ignores pretrial management decisions made by the trial judge, and beyond that would apparently shift the burden of proof to allow a plaintiff to focus in the first instance upon whether the so-called restraint imposed by a sports or

industry rule is "reasonable" notwithstanding that almost any rule or standard can be debated on some level. Plaintiff would ask federal juries to sit and review sports or industry rules without first requiring any meaningful evidence of an unlawful "conspiracy." This conclusion surely follows from close examination of a leading argument advanced by Petitioner, namely that "the USTA lacked any concrete evidence that Cheetahs were less safe than other sulkies" (Pet. at 12). The First Circuit wisely saw the flaw in an approach which focuses upon the outcome of rulemaking rather than the fairness of the process followed:

> [I]t is commonplace, and often very useful, for organizations to recommend quality standards (like National) or adopt them as part of a certification process (like the College). Merely to say that the standards are disputable or have some market effects has not generally been enough to condemn them as "unreasonable" under the Sherman Act. A few cases say this explicitly [citation omitted], but more important, something else or more extreme is generally present in the cases that have condemned quality standards as anticompetitive.
>
> In such cases, the principal concern has been the use of standards setting as a predatory device by some competitors to injure others; normally there is a showing that the standard was deliberately distorted by competitors of the injured party, sometimes through lies, bribes, or other improper forms

> of influence, in addition to a further showing of market foreclosure. [citation omitted] Without some kind of protective screen for treble damage liability, there would be few standards set since most involve disputable judgment calls.
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> *D. I Research, supra*, at 57-58.

No reason exists to reconsider fifteen years of well-accepted precedent developed since *Monsanto*. Disrupting the orderly application of §1 of the Sherman Act is unjustified by anything in the Petition, or in current academic literature. Absent any evident misunderstanding among the Circuits, disruption of the orderly analysis of cases under §1 of the Sherman Act - inherent in the extreme positions set out in the Questions Presented - counsels strongly against grant of the Writ. The result reached by the Sixth Circuit in this case demonstrates a good grasp of the judicial analysis required, including the practical need to search out the economic motive(s) of alleged co-conspirators. Wisely, this Court has not seen fit to interpret the Sherman Act in a way which would force litigants through expensive antitrust proceedings whenever, in the words of the First Circuit, "a plaintiff has nothing more than unlikely speculations" because the law must "protect society from the costs of highly unpromising litigation." 170 F.3d, at 56.

C. Other Questions Presented

To avoid waiver under this Court's Rule 15.2, Respondent would note that a grant of Certiorari on any of the Questions Presented might then require resolution of the following issues, which were not necessary to the decisions in the lower courts. First, given the factual finding that there was no economic motive for the USTA's conduct, and given longstanding caselaw accepting as fundamental that the antitrust laws only regulate commercial activity, as opposed to noncommercial conduct such as rulemaking, could the USTA have any legal liability on these facts (assuming they were re-proven at the new trial granted by the trial judge)? Caselaw such as *Smith v. NCAA, supra,* 139 F.3d, at 185-187, and *Virginia Vermiculite Ltd. v. W.R. Grace & Co.*, 156 F.3d 535, 540-41 (4th Cir. 1998) suggests that rulemaking like that challenged here is outside the scope of analysis under the Sherman Act.

Second, virtually all of the conduct at issue here took place within the Committee. While created and operated by the USTA, to be sure, under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), cooperation within a single entity like the USTA and its Committee of volunteers does not normally qualify as an actionable "conspiracy" under §1. *See, Chicago Prof. Sports Ltd. v. NBA, supra,* 95 F.3d, at 598-600. For reasons having to do with the way the case was pleaded the only claim tried to the jury was predicated upon conduct external to the USTA (namely the alleged conspiracy with Jerald). However, the

applicability of *Copperweld* would be presented in response to certain arguments of Petitioner (Pet. at 21 – 23) were one to ignore the holding below that Petitioner was untimely in raising such arguments in this case "nearly three years after its filing and far beyond the close of discovery." (App. C-34)

Third, because the dominant feature in the regulation of harness racing is individual state racing commissions, the application of the *Noerr-Pennington* doctrine to these facts is another serious issue if one were to get past the absence of a "conspiracy."

CONCLUSION

For all the reasons stated, the Petition should be denied.

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